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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1092 of 2001

APPELLANT
~~PETITIONERS~~ Poyami Baisu s/o Nulu Muria, aged about 25 years resident of village Ketan Pal, P.S. Kutaru, District Dantewara, (C.G.)

Versus

RESPONDENT State of Chhattisgarh, through P.S. Kutaru, District Dantewara C.G.)

Appearance:

Shri Anil Pandey, counsel for the appellant.

Shri Sudhir Bajpai, Additional Public Prosecutor for the State.

DB: **Hon'ble Shri Justice L.C. Bhadoo, &**
Hon'ble Shri Justice Sunil Kumar Sinha, J, J.

ORAL JUDGMENT
(24.10.2007)

The following judgment of the Court was passed by

L.C. Bhadoo, J,

(1) This appeal is directed against the judgment of conviction and order of sentence dated 07th September, 2001 passed by Special Judge under S.C. & S.T. Act, Jagdalpur (Bastar) in Sessions Trial No.164/2001 whereby and whereunder the learned Special Judge after holding accused appellant guilty for commission of the offence u/ss 302 & 201 of the I.P.C., sentenced him to undergo R.I. for life imprisonment and to pay a fine of Rs.500/- in default of payment of fine, to further undergo R.I. for 1 year; & R.I. for 3 years imprisonment and to pay a fine of Rs.500/-, in default thereof, to further undergo R.I. for six months.

(2) The case of the prosecution in brief is that the accused appellant Poyami Baisu and his wife Poyami Sunni (since deceased) were residing together. On 01.1.2001 the accused appellant gave *Merg* intimation Ex.P.6 in the police station Kutru to the effect that in the evening of 31st December, 2000, his wife

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Sunni went to the house of his sister Lakmi. In the night, he called her, she did not prepare the food nor she tied the cows and oxen and after altercation with the accused, she consumed poison meant for killing fish. He gave her water mixed with Tamarind solution but she could not survive and died. Receiving this report, the Investigating Officer left for the scene of occurrence and after giving notice Ex.P.8 to the *Panch* prepared inquest Ex.P.9 on the body of deceased. The body of deceased was sent for postmortem examination to Primary Health Center, Bhairamgarh under Ex.P-5(A) where Dr.A.S. Sendram, Assistant Surgeon, conducted the postmortem. He opined that the mode of death was asphyxia due to strangulation, as a result of injury No.2, which was antemortem and the death was homicidal in nature. He prepared the postmortem report Ex.P.5. Under Ex.P.1, the investigating officer seized one bottle from the place of occurrence. After receiving postmortem report, he registered the F.I.R., Ex.P.7 for commission of the offence u/s 302/201 of the I.P.C. The I.O. prepared site plan Ex.P.10 of the place of occurrence. The seized bottle and viscera which was preserved were sent for chemical examination under Ex.P.12 to the Forensic Science Laboratory, Sagar, from where report Ex.P.13 was received and as per the F.S.L. Report (Ex.P.13) no poison was found.

(3) After completion of the investigation, charge sheet was filed in the Court of Judicial Magistrate, First Class, Dantewada, who in turn committed the case to the Sessions Judge, Jagdalpur from where the learned Special Judge received the case on transfer for trial.

(4) The Prosecution in order to establish the charge against the accused examined 6 witnesses. The statement of accused was recorded u/s 313 Cr.P.C., in which he denied the material appearing against him. However in reply to question no.4, it is stated that the body of his wife was in his house but in further explanation, he stated that his wife was suffering from unsoundness of mind, she used to run in the forest, the body of Sunny was found in the forest after two days, he is innocent and he has been falsely implicated in the crime.

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(5) The learned Special Judge, after hearing counsel for the respective parties, convicted and sentenced the accused as aforesaid.

(6) We have heard Mr.Anil Pandey, counsel for the appellant and Shri Sudhir Bajpai, Addl. Public Prosecutor, for the State.

(7) Mr.Pandey has not disputed the homicidal death of Poyami Sunni. More-over, P.W.4 Dr.A.S. Sendram has stated that on 02.1.2001 he conducted the postmortem on the body of Sunni and noticed the following external injuries :

(i) A contusion on the right side of the face in size of 2" x 2".

(ii) A contusion in the front of neck in size of 3" x 3"

(iii) A contusion on the chest over sternum bone in size of 2" x 2"

(iv) A contusion on the left side of arm in size of 1 ½" x 1"

(v) A contusion on the left side of the face in size of 1" x 1".

He further stated that on dissection of the body, the hyoid bone below the injury No.2 was found fractured. Injuries No.3, 4 & 5 can be caused by fist and leg. Injury no.2 can be caused by pressing neck. All the injuries were antemortem in nature and the death was homicidal. His report is Ex.P.5. He has denied the suggestion in cross examination that the said injuries can be caused by fall and he has stated that injury no.2 was caused by hand. The hyoid bone was fractured but there was no hemorrhage in the tissues. In view of the above medical evidence , it is established that the death of Poyami Sunni was homicidal in nature.

(8) As far as the involvement of the accused in crime in question is concerned, there is no direct or ocular evidence in this case. The whole case rests on the circumstantial evidence i.e.,

(i) that the accused made extra judicial confession before P.W.1 Sukhram;

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(ii) that the accused and the deceased were seen in the house just before the death of Poyami Sunni and her dead body was found there and recovered from the house of accused.

(iii) that the accused gave false information in the police station Ex.P.6 to the effect that Sunni died on account of consuming of poison.

(9) As per the settled law, in order to rest conviction of an accused based on the circumstantial evidence, the prosecution is required to establish the following points in view of the decision of the Apex Court rendered in the matter ***Dhananjoy Chatterjee –Vs- State of W.B. reported in (1994) 2 SCC 222***, which is quoted below:

> "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof." In order to rest the conviction based on the circumstantial evidence, as has been held by the Apex Court.

(10) As far as the first circumstance regarding extra judicial confession is concerned, P.W.1 Sukhram has turned hostile. On cross examination by the Addl. Public Prosecutor, he stated that the accused made extra judicial confession before him that he committed murder of Sunni by pressing her neck and after her death, he tried to give her the medicine meant for killing the fish, but the same could not be given to her. Again on the cross examination by counsel for the accused, this witness has stated that it is correct that the accused informed the police that Sunni died on account of consumption of poison. In para 7, he has stated that there was no mark of injury on her body and the

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accused did not disclose that how Sunni died. Further he has stated that the accused said that he had not pressed the neck of Sunni. The learned trial Court has observed that even if a witness has turned hostile, his or her whole evidence cannot be brushed aside. The admissible portion can still be used and on that basis, the trial Court has held that this witness has stated that the accused made extra judicial confession before him and therefore, the trial Court has relied on that portion, but this finding of the trial Court is not correct for the reason that even though on cross examination by the Addl. Public Prosecutor, the witness Sukhram said that the accused made extra judicial confession before him regarding pressing the neck of deceased by him, but on cross examination by counsel for the accused, this witness has again stated that it is incorrect to say that the accused made confession before him regarding pressing of neck by him. Therefore, in view of evidence given by this witness on cross examination by counsel for the defence, the earlier evidence of this wifness regarding extra judicial confession made by the accused before him stands vanished. More over, it is settled law that extra judicial confession can be made admissible only if the same is voluntary and true. This witness has given the wavering evidence and he has changed his version at 2-3 places, therefore it cannot be termed as voluntary and true statement. There is no other material on record to corroborate the evidence, without which it is unsafe to rely on such a wavering evidence, therefore, the prosecution has not been able to establish the fact that the accused made voluntary and true extra judicial confession before thiis witness.

(11) As far as the second circumstance is concerned, P.W.1 Sukhram in Para 3 of his evidence has stated that deceased Sunni used to reside with accused Baisu. In para 2 he has stated that the body of Sunni was seen by him in the house of the accused. P.W.2 Lakhmu has stated in para 1 of his evidence that the accused and deceased were residing together and no other person was residing with them. As per the inquest Ex.P.9, the body of Sunni was found in the house of the accused. The site plan Ex.P.10 prepared by the I.O., also establishes that the body of Sunni was found in the house of the accused. P.W.5 the

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investigating officer Kasinath has stated that on 02.1.2001, he went to the house of accused and prepared the site plan of the place of occurrence which bears his signatures. Even the accused in his statement u/s 313 Cr.P.C., in reply to questions No.2 & 4 has categorically stated that his wife was residing with him. When she died, her body was in his house. Though in the explanation, in reply to question No.39, he has stated that his wife became mad, therefore, she used to run in the forest and her body was found in the forest two days after but in fact, the body was found in the house of the accused and the site plan was prepared by P.W.5 Investigating Officer Kasinath, who stated that even the postmortem on the body of the deceased was conducted on the spot on 02.1.2001. This witness has not been cross examined to suggest that in fact, the dead body of deceased Sunni was found in the forest and from there the body was brought to the house. Even a perusal of the *merg* intimation Ex.P.6 given by the accused himself does not indicate that the body was brought from the forest and no material is available on record which is suggestive of the fact that in fact Sunni had died in the forest and from forest the body was brought to the house, therefore, this explanation of the accused that the body was brought after two days from the forest is false. On the contrary, in the *merg* intimation given by the accused, it has been mentioned that he called his wife from the house of his sister and thereafter, there was an altercation between the two as she did not cook the meal and tie the cattle and after altercation, she consumed the poison, therefore, this merg intimation itself demolishes the explanation of the accused given in the statement u/s 313 Cr.P.C. Therefore, his explanation in the statement u/s 313 Cr.P.C. is false.

(12) As far as the 3rd circumstance is concerned, from perusal of evidence of P.W.4 Dr.A.S. Sendram it shows that he has categorically stated that he noticed as many as 5 injuries on the body of Sunni and injury No.2 was on the neck, as a result of which even her hyoid bone below this injury was found fractured and that was on account of strangulation, therefore, the report Ex.P.6 lodged by the accused that Sunni died on account of consuming of the poison was found to be false and the accused

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has not given any explanation that how Sunni received ante-mortem injuries because he was the best person to explain the circumstances in which Sunni received the antemortem injuries.

(13) As per the provisions of section 106 of the Evidence Act, there is burden on the accused that he should explain the circumstances under which a deceased sustained homicidal injuries. Section 106 of the Evidence Act says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him and as per the material available on record, the accused and the deceased used to reside in the house and the deceased sustained the homicidal injuries then it was within the special knowledge of the accused that how Sunni received the homicidal injuries. Therefore, the burden was on him to explain that how Sunni received the homicidal injuries, which he has failed to explain. On the contrary, he gave false information under Ex.P.6 to the Police and therefore, that is an additional circumstance against the accused. We are fortified in our view by the decisions of the Apex Court in the matters of ***Raj Kumar Prasad Tamrakar –vs- State of Bihar 2007 Scale-19 reported in 2007 AIR SCW 295, State of Rajasthan –vs- Kashi Ram, 2006 (XI) SCALE 440 reported in (2006 AIR SCW 5768) and State of Punjab –vs- Karnail Singh (2003) 11 SCC 271 and 2007 AIR SCW 5995 in the matter of State of Rajasthan Vs. Parthu.***

(14) For the foregoing discussions, the chain of circumstances in this case is complete, as the accused and deceased were residing in the house together where the dead body was found. No other person was residing with them. Sunni died on account of homicidal injuries sustained. The accused gave false explanation before the Police under Ex.P.6 merg intimation that Sunni died on account of consuming of poison whereas she has met with homicidal death and ultimately the accused failed to discharge the burden which was on him as per the provisions of section 106 of the Evidence Act to explain the circumstances, under which Sunni received homicidal injuries. Therefore, in view of the above established circumstances and circumstantial evidence, only

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irresistible

~~sustainable~~ conclusion which can be drawn is that the accused was the author of crime in question and there is no possibility of his innocence or involvement of any other per son in the crime in question.

(15) In the result, the appeal being devoid of merit fails, same is liable to be dismissed and it is hereby dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge

Rao